TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

MISCELLANEOUS:

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, dated July 2, 1973, appears at page 1a of the Appendix to the Petition for Certiorari[1] and is reported at 453 Pa. 245, 307 A. 2d 851.

The opinion of the Commonwealth Court of Pennsylvania, dated October 10, 1972, upon rehearing, appears at P. 51a and is reported at 6 Commonwealth Ct. 453, 295 A. 2d 349.

The first opinion of the Commonwealth Court of Pennsylvania, dated June 8, 1972, appears at P. 55a and is reported at 6 Commonwealth Ct. 433, 291 A. 2d 556.

The opinion and final decree of the court en banc of the Court of Common Pleas of Allegheny County, dated July 14, 1971, appear at P. 78a and 83a and are unreported.

The opinion and decree nisi of the Court of Common Pleas of Allegheny County, dated March 19, 1971, appear at P. 84a and 102a and are reported at 119 P.L.J. 327.

---

[1]References designated by "A." are to the pages of the Single Appendix filed herewith.

References designated by "P." are to the pages of the Appendix to the Petition for Certiorari filed with this Honorable Court October 1, 1973.

STATEMENT OF JURISDICTION

Petitioner seeks review of the order and opinion of the Supreme Court of Pennsylvania dated July 2, 1973 (P. 1a). Rehearing was denied by the Supreme Court of Pennsylvania by order dated August 7, 1973 (P. 50a). The jurisdiction of the Supreme Court of the United States is invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

The fourteenth amendment to the Constitution of the United States provides, in relevant part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

City of Pittsburgh Ordinance No. 704 of 1969 is set forth in full at pages 103a through 110a of the Appendix to the Petition for Certiorari.

QUESTIONS INVOLVED

I. Under this Court's interpretation of the due process clause and the separation of powers doctrine, is the judiciary prohibited from imposing a limitation upon the legislatively-set rate of a revenue tax even where the taxpayer competes with a governmental agency exempt from certain taxes?

II. Have respondents failed to prove confiscation where they have not shown (1) unprofitability; (2) that they are forced out of business, and (3) that the tax cannot be passed on to customers?

(Petitioner requests that these questions be answered in the affirmative.)

STATEMENT OF THE CASE

On February 20, 1970, twelve operators (respondents herein) of off-street parking facilities located in the central city area of the City of Pittsburgh filed an action to enjoin enforcement of City of Pittsburgh Ordinance No. 704 of 1969 (P. 103a), hereafter the "Parking Tax Ordinance".

The Parking Tax Ordinance was enacted *"to provide for the general revenue"* (P. 103a) by imposing a tax on the privilege of engaging in non-residential parking transactions for a consideration (emphasis added). It established the rate at 20% of the gross receipts derived from engaging in parking transactions, superseding and replacing a 1968 ordinance which had levied the identical tax at the rate of 15%. The 15% tax enacted in 1968 had, in turn, superseded and replaced the initial Parking Tax Ordinance enacted in 1962 at the rate of 10% (P. 2a).

At the time of suit, respondents owned and operated approximately 17,000 of the 18,000 private spaces in the downtown area of the City, thus controlling approximately 71% of the 24,300 spaces there (A. 281a; P. 2a; 53a; 62a). Other private operators, not respondents in this case, controlled about 1000 spaces (4%). The balance of about 6100 spaces (25%) was owned by the Parking Authority of the City of Pittsburgh, an independent agency of the Commonwealth of Pennsylvania created pursuant to the Parking Au-

thority Law of June 5, 1947, P. L. 458, 53 P.S. §341 et seq. (A. 280a; P. 62a; Finding No. 8, P. 87a).

The 71% of the industry represented by respondents paid $1.3 million in parking tax out of the total industry payments of $2.1 million at the 15% rate in 1969, and respondents paid $1.6 million at the 20% rate in 1970 (P. 62a; A. 597a). The tax has thus raised approximately $2.5 million dollars per year since 1970 (P. 43a; A. 597a).

This suit sought to enjoin the enforcement of the Parking Tax Ordinance on the grounds (1) that it created a discriminatory and arbitrary classification in violation of the equal protection and uniformity clauses of the federal and state constitutions; and (2) that it constituted a confiscatory taking in violation of the due process clause of the fourteenth amendment (A. 3a-7a; P. 85a). After an Answer was filed by the City (P. 12a), the matter was tried on Sept. 15-17, 1970. On March 19, 1971, the Court of Common Pleas of Allegheny County filed an adjudication and decree nisi, together with findings of fact and conclusions of law (P. 84a-102a). The court held that the tax violated no constitutional provisions.[2]

Although the Pennsylvania Supreme Court, as noted by the dissents, paid scant heed to the chan-

---

[2] Both the Commonwealth Court of Pennsylvana and the Supreme Court of Pennsylvania unanimously agreed with the Court of Common Pleas and petitioner City that the parking tax was not violative of the equal protection clause or the uniformity clause. The argument before this Honorable Court, therefore, will deal only with those portions of the courts' opinions dealing with the due process clause.

cellor's findings (P. 42a), which have the force and effect of a jury verdict (P. 28a), those findings, most of which were not disputed by the Supreme Court (P. 15a-16a, footnote 7), are significant.

The chancellor, noting that respondents were all still in business, found that the parking tax was not forcing the operators out of business (P. 98a). The chancellor pointed out that respondents' gross receipts, *after* the parking tax, increased in 1969 despite the increase in the parking tax from 10% to 15%, and remained virtually stable for the first six months of 1970 after the increase from 15% to 20% (A. 414a; P. 99a). Moreover, he found that any decreased return resulted from increased labor costs and other operating expenses as well as the parking tax (P. 99a).

The chancellor's finding that the parking tax was not forcing respondents out of business was buttressed by his findings concerning their failure to pass the tax on to their customers. Among other things, the chancellor found:

> "19. The demand for parking spaces in the City of Pittsburgh far exceeds the supply.
>
> 20. None of the plaintiffs have increased their rates since February of 1970.
>
> 21. Plaintiffs have not attempted to pass on the increased tax to the parking lot patrons.
>
> * * * * * *
>
> 27. The City of Pittsburgh experienced only a temporary reduction in the number of cars parked at its facility on the Wharf after it doubled

its price for parking." (A. 417a; P. 16a; 42a; 89a-90a).

Furthermore, one of the respondents, Sheppard, testified on cross-examination as follows:

> "Q. Sir, has it been your experience in the past that when you increase the rates you also receive an increase in your revenue?
>
> A. Yes, sir." (A. 187a).

The Appendix to the dissenting opinion of Justice Pomeroy (P. 49a) shows clearly that respondents themselves recognized that rates could be raised in order to maximize revenues.

Respondents' exceptions to the decree nisi of the chancellor were overruled by the court en banc in an opinion and final decree dated July 14, 1971 (P. 78a).

Respondents appealed to the Commonwealth Court of Pennsylvania, which issued an opinion on June 8, 1972 (P. 55a-77a) and again, adhering to the same division after reargument, on October 10, 1972 (P. 51a-54a). While suggesting that the tax rate was too high, the majority (4-3) acknowledged that courts cannot interfere with the legislative function of setting a tax rate when, as here, the ordinance is clearly an exercise of the taxing power (P. 64a).

The Supreme Court of Pennsylvania then allowed an appeal and, by a 4-3 majority, reversed the courts below. Justice Roberts, for the majority,[3] held that

---

[3] Justice Roberts' opinion was joined in by only two other justices. Justice O'Brien concurred in the result (P. 27a).

the parking tax violated the due process clause of the fourteenth amendment because of its high rate, combined with the fact that "the taxing body was in direct competition . . . with private enterprise'"[4] (P. 21a).

Three justices of the Pennsylvania Supreme Court dissented. Justice Eagen, in an opinion concurred in by Chief Justice Jones and Justice Pomeroy, concentrated upon the incorrect legal underpinnings of the majority opinion, pointing out that the case law in this Court has long interpreted the due process clause to allow the legislative body to set a tax rate without interference from the judiciary (P. 27a). Justice Pomeroy, in a separate dissenting opinion, dealt largely with respondents' failure to show sufficient facts to entitle them to relief (P. 38a-49a).

The City's petition for reargument was denied per curiam August 7, 1973, Justice Eagen dissenting (P. 50a).

---

[4] Actually, §5 of the Parking Authority Law, 53 P.S. §345, provides, in relevant part, that a Parking Authority "shall in no way be deemed to be an instrumentality of the city or engaged in the performance of a municipal function." Moreover, the Pennsylvania courts had, prior to this case, consistently distinguished between an authority and its organizing municipality. *Whitemarsh Twp. Auth. v. Elwart*, 413 Pa. 329, 332, 196 A. 2d 843 (1964); *Simon Appeal*, 408 Pa. 464, 184 A. 2d 695 (1962).

SUMMARY OF ARGUMENT

The Supreme Court of Pennsylvania erred in holding that the City of Pittsburgh Parking Tax Ordinance violates the due process clause of the fourteenth amendment. This Court has held that a revenue tax may constitutionally be imposed at any rate that the legislative body deems proper, even if businesses may be harmed thereby.

Interference by a court with the legislatively-set rate of tax is a violation of the separation of powers doctrine. The power to tax has been placed by the people with their elected representatives. From *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), to the present, this Court has held that the security against an alleged abuse of the power of taxation must rest in the reality that a legislative body acts upon its constituents. The courts determine only whether the power to tax exists; the extent or rate of tax is a matter for the legislature. If courts were to interfere with the rates of tax set by legislative bodies, a floodtide of litigation would engulf the judicial system.

The fact that the taxing body may compete with the taxed industry does not warrant a different result. In several cases this Court has sustained taxes against due process challenges where the taxing body competes with the private sector. The Constitution does not protect private industry against the consequences of competition.

If the rule were otherwise and the decision below were correct, the ability of government to serve the public would be devastated. Government competes with the private sector in a multitude of areas, ranging from education to transit to recreational services. If government were required to forfeit its right to tax the private sector wherever it competes with private industry, public bodies would be unable to provide essential services. In particular, the decision below gravely threatens the power of government to tax aspects of the automobile industry in order to promote the use of mass transit and help solve the energy and pollution problems.

Even if the legal theory of the court below were correct, respondents have not proven confiscation of their property. They have not even shown unprofitability. Their major exhibit was prepared by an unqualified person; was unrepresentative of the parking industry as a whole; and most importantly, rested not on actual experience, but on projection.

Assuming respondents had proven unprofitability, that would not show confiscation. Respondents were not being forced out of business, and in fact their gross receipts, after the tax, were remaining steady.

Nor did respondents prove that the tax could not be passed on to the consumer. The alleged competition from the Parking Authority is an irrelevant factor even if Authority rates were lower than private rates. Because Authority garages are filled to capacity and an unsatisfied demand for parking spaces exists in downtown Pittsburgh, private operators are not af-

fected by Authority rates. Actual experience has shown that general rate increases by private operators in the past have always resulted in an increase in gross receipts.

Thus, neither the law nor the facts of this case support the holding that the parking tax violates the due process clause. The order of the court below should be reversed.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT A LIMITATION UPON A REVENUE TAX

A. The Due Process Clause Does Not Limit the Discretionary Power of a Legislative Body To Select the Rate of a Revenue Tax Even Though an Industry May Be Harmed Thereby

The holding of the majority of the Supreme Court, invalidating the parking tax as violative of the due process clause of the fourteenth amendment, conflicts with the consistent holdings of this Court that the due process clause is not an impediment to a legislature's power to impose any rate of taxation that the legislature, in its wisdom, sees fit to levy for general revenue purposes.

It would be difficult to improve upon the formulation unanimously set forth by this Court when it sustained the 15 cents per pound excise tax on butter substitutes in *Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934). That case, upon which both the majority in the Commonwealth Court (P. 65a) and the dissenters in the Supreme Court (P. 30a) relied heavily, held that the due process clause is a limitation upon a tax-

ing statute only when the statute is not really a tax at all:

> "Except in rare and special instances, the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. Brushaber v. Union Pac. R. Co., 240 U.S. 1, 24. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. French v. Barber Asphalt Paving Co., 181 U.S. 324, 329; Heiner v. Donnan, 285 U.S. 312, 326."

In *Magnano,* the appellant company had ceased to make intrastate sales, claiming that the tax was prohibitive. Yet this Court, conceding that to be the case, nonetheless held that the tax did not violate the due process clause, citing, at pp. 44-45, several earlier cases to the same effect:

> *"Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses* (Loan Association v. Topeka, 20 Wall. 655, 663-664; McCray v. United States, supra, 56-58; and authorities cited; Alaska Fish Co. v. Smith, 255 U.S. 44, 48, 49; Child Labor Tax Case, supra, 259 U.S. 38, 40-43), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power

denied by the Federal Constitution to the state. The present case does not furnish such a demonstration.

"The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the 10 percent tax imposed upon the notes of state banks involved in Veazie Bank v. Fenno, 8 Wall. 533, 548. This Court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments." (emphasis added).

In dictum in *Magnano* this Court recognized that "in rare and special instances" a purported taxing statute could involve not an exertion of the taxing power, but the exertion of a different and forbidden power such as the confiscation of property. The majority in the court below seized on this language (P. 19a; 21a) in *Magnano* while ignoring the factual situation involved there, the acknowledged destruction of the business, which was held not to be a confiscation of property prohibited by the due process clause.

The "rare and special instances" to which the *Magnano* Court referred are not cases in which a rate is attacked as being too high, but cases in which the subject of the tax is beyond the jurisdiction of the taxing body.[5] No case has been found in which this

[5] For instance, in *Nat. Bellas Hess v. Dept. of Revenue*, 386 U.S. 753, 756 (1967), this Court held that in determining

Court has invalidated a tax under the due process clause because of its rate.

The question of whether a taxing measure is not really a taxing measure but confiscation cannot be answered by looking to the rate. If that were the test, *Magnano* would have been decided differently. A different result would also have been reached in *Alaska Fish Co. v. Smith*, 255 U.S. 44, 48 (1921), where an Alaska statute levying a heavy tax upon persons manufacturing fish oil was upheld against the contention that it would confiscate the plaintiffs' business. Justice Holmes stated:

> "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk."

Whereas the Pennsylvania Supreme Court has struck down this tax as "excessive and unreasonable"

---

whether a state tax meets the requirements of due process, the controlling question is whether the state has given anything for which it can ask a return. If the situs of the taxed property is wholly outside the state, then it *would* be violative of due process to permit the tax. Likewise, this jurisdictional argument—that the situs of the assets was outside Pennsylvania—was the basis for this Court's striking down the estate tax in *Frick v. Pennsylvania*, 268 U.S. 473 (1925).

Those two cases considered lack of jurisdiction geographically. The cases referred to in footnote 1 in *Magnano* as the rare and special instances involved lack of jurisdiction temporally. *Nichols v. Coolidge*, 274 U.S. 531 (1927) struck down an attempt to tax a transfer completed prior to the enactment of the statute. In *Heiner v. Donnan*, 285 U.S. 312 (1932), the statute purported to treat as conclusively within a decedent's estate a gift that had been completed prior to his death.

(P. 20a), this Court has held that the fourteenth amendment does not prohibit a tax merely because it is unwise, unfair, or burdensome. *Harvester Co. v. Dept. of Taxation,* 322 U.S. 435, 444 (1944).

If the courts had the power to limit the rate of a tax, it would have been unnecessary to hold that state taxes on national bank notes, *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), or on United States bonds, *Macallen Co. v. Massachusetts,* 279 U.S. 620 (1929), were unconstitutional because the power to tax involves the power to destroy. No power of destruction would exist because the courts could limit the rate when that point of destruction approached.

The lesson of *Magnano, supra,* and *Alaska Fish Co., supra,* is that a high rate cannot be a basis for declaring that a tax is not really a tax but a confiscation. This teaching the majority in the court below ignores. As stated by Justice Eagen in dissent (P. 31a):

> "The majority opinion does not indicate this taxing statute qua taxing statute is invalid, or the taxing measure 'does not involve an exertion of the taxing power', which are the guidelines established by the Supreme Court of the United States. Rather, the majority opinion focuses on the tax rate and its enforcement, and I view this as error. It is one thing to say a taxing statute is arbitrary and beyond the reach of the taxing power of the legislative branch, a point I do not contest, but it is quite another to say the exercise of the lawful taxing power is a violation of due process of law because of a high tax rate."

"The Due Process Clause . . . does not protect taxpayers against increases in tax liability." *Flast v. Cohen,* 392 U.S. 83, 105 (1968).

There is not a scintilla of evidence in the record of this case that the City wants to accomplish anything more in raising its parking tax 5% than to obtain additional revenue. The tax has been successful in raising revenue. Respondents' Exhibit 3 in this case shows that the 15% tax, enacted in 1968 for the year 1969 and never challenged in the courts, brought in over two million dollars in revenue for that one year (A. 597a; 81a). The 1970 tax, which was paid until superseded by the 1973 Ordinance, is exactly the same tax as the 1969 tax except for a 5% increase in rate (P. 8a) required to augment the City's revenue to cover costs of inflation.

This tax did not, like Athena, spring full-grown from the head of Zeus. Rather, it is built upon the foundation of the earlier taxes, identical except as to rate since the year 1962 (P. 8a; 56a). The 10% tax had been sustained against constitutional challenge by the Supreme Court of Pennsylvania in *McGillick v. Pittsburgh,* 415 Pa. 581, 203 A. 2d 480 (1964), while Philadelphia's similar 10% gross receipts parking tax had been sustained, specifically against charges that it was confiscatory, in *Philadelphia v. Eglin's Garages, Inc.,* 342 Pa. 142, 19 A. 2d 845 (1941) and *Philadelphia v. Samuels,* 338 Pa. 321, 12 A. 2d 79 (1940).

The fact that the tax raises revenue "obliterates any question of lack of due process." *Shapiro v. City of New York,* 325 N.Y.S. 2d 787, 794, 67 Misc. 2d 1021

(1971), citing *Magnano* in sustaining a tax on professionals' earnings against a due process challenge.

Similarly, in *Clark v. City of Cincinnati*, 99 Ohio App. 152, 131 N.E. 2d 599, 603 (1954), *aff'd* 163 Ohio St. 532, 127 N.E. 2d 363 (1955), the court held that the due process clause was irrelevant to the constitutionality of an earned income and net profits tax:

> "A tax law is per se due process. The ordinance is a revenue measure solely. Its only object was to raise revenue. That the council had power to tax to raise revenue to pay the operating expense of the municipal government cannot be disputed."

Even if Pittsburgh had had another purpose in addition to its revenue purpose, the fact that the tax raises revenue immunizes it from attack. This is so even if the revenue raised is negligible (not the case here) or the revenue purpose is secondary. *United States v. Sanchez*, 340 U.S. 42, 44 (1950).

B. The Decision Below Violates the Separation of Powers Doctrine, With Dire Consequences for Judicial Caseloads

---

The separation of powers doctrine is at the heart of this Court's insistence that the due process clause does not limit a revenue tax. If allowed to stand, the holding of the court below, in addition to depriving one of our hard-pressed urban areas of millions of

dollars of needed revenue, will also create a devastating crisis in the courts. At a time when this Court and most courts throughout the country are inundated with work, the court below would abjure the wisdom of Chief Justice Marshall and open up the floodgates to a possible tidal wave of litigation attacking taxes as being too high.

In *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 428 (1819), Chief Justice Marshall, for the Court, stated:

> "[T]he power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.
>
> "The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited. they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse."

Moreover, the framers of the Constitution recognized that taxes that are too high carry with them the

seeds of their own destruction. In *The Federalist No. XXI,* Bourne Edition (1914), Vol. I, p. 140, Alexander Hamilton stated:

> "It is a signal advantage of taxes on articles of consumption, that they contain in their own nature a security against excess. They prescribe their own limit; which cannot be exceeded without defeating the end proposed,—that is, an extension of the revenue. When applied to this object, the saying is as just as it is witty, that 'in political arithmetic, two and two do not always make four'. If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them."

Thus both the influence of constituents on legislators and a Tocquevillian enlightened self-interest on the part of those legislators combine to limit the rate of taxes in the legislative branch of government.

Justice Eagen in his dissent (P. 34a) properly condemned the majority's intrusion on legislative power:

> "The most troublesome aspect of the rationale adopted by the majority opinion is that by considering the tax rate, it is taking on a non-judicial function, and in effect sitting as a legislative body. This approach strikes at the heart of the principle

of separation of powers and is, therefore, contrary to constitutional doctrine. The sum and substance of the majority's opinion is: the tax rate is too high for the garage owners to make a substantial profit; hence, the tax is unjust and must be struck down. However, the wisdom of a tax rate is strictly for the legislative branch, and for this Court to strike a tax down because of a high rate is to usurp a legislative power. Moreover, by so doing this Court has to go beyond its own power and exercise the usurped power in an arbitrary fashion by substituting its concept of public policy, or wisdom, for that of the Legislature."

If this Court were to place its imprimatur upon judicial interference with the rates of tax, it is difficult to see an end to the litigation that would be engendered. Practically all Americans agree that taxes are higher than they would like them to be. If a citizen's visceral reaction can be translated into lawsuits requiring courts to determine whether taxes are too high, the courts will have time for little else.

As Justice Stewart noted for this Court in *Bates v. Little Rock,* 361 U.S. 516, 524 (1960) (dictum), "No power is more basic to the ultimate purpose and function of government than is the power to tax." Since *McCulloch v. Maryland, supra,* this Court has been steadfast in preventing judicial encroachment upon that power. In *Veazie Bank v. Fenno,* 75 U.S. (8 Wall.) 533, 548 (1869), this Court stated:

"The power to tax may be exercised oppressively upon persons, but the responsibility of the

legislature is not to the courts, but to the people by whom its members are elected."

Likewise, in *Michigan Central Railroad v. Powers,* 201 U.S. 245, 296 (1906), quoting Chief Justice Marshall in *Providence Bank v. Billings,* 29 U.S. (4 Pet.) 514, 563 (1830), this Court held:

> "This vital power [of taxation] may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally."

See also, Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449, 465 (1829) (Marshall, C. J.); *Bank of Commerce v. New York City,* 67 U.S. (2 Black) 620 (1862); *Railroad Company v. Peniston,* 85 U.S. (18 Wall.) 5 (1873); *Spencer v. Merchant,* 125 U.S. 345 (1888); *McCray v. United States,* 195 U.S. 27 (1904); and *Fox v. Standard Oil Co.,* 294 U.S. 87, 99 (1935), in the last of which Justice Cardozo noted:

> "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers."

This Court stated in *Stewart Dry Goods Co. v. Lewis,* 294 U.S. 550, 563 (1935):

"Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases."

It is respectfully submitted that the court below has erred in extending the judicial function far beyond the limits set by this Court. In so doing, it makes the courts into the "super-legislatures" which this Court has often held they should not be. *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965). Petitioner urges this Court to restore the proper balance between the judicial and the legislative branches of government.

C. The Rule That the Due Process Clause Does Not Limit a Revenue Tax Is Not Changed Where Government Competes With the Private Sector

---

The majority purports to distinguish *Magnano, supra; Alaska Fish, supra; McCray v. United States,* 195 U.S. 27, 56 (1904); *Brushaber v. Union Pac. R.R.,* 240 U.S. 1, 34 (1916); and similar cases,[6] holding that the due process clause does not limit the rate of a revenue tax, on the basis that here an added element exists, making it a case of first impression—the element of competition from the taxing body.[7]

---

[6] *Magnano* has most recently been cited with approval by this Court in *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973). *See also, Bode v. Barrett,* 344 U.S. 583, 585 (1953).

[7] As noted in footnote 4, *supra,* the competition does not come from the taxing body. For the purpose of this first argument, however, it will be assumed *arguendo* that the characterization of the majority of the Pennsylvania Supreme Court was correct.

Justice Roberts cites no authority for his theory, save a law review article, Sax, *Takings and the Police Power,* 74 Yale L.J. 36 (1964), and one Hawaii case, *Hasegawa v. Maui Pineapple Co.,* 52 Hawaii 327, 475 P. 2d 679 (1970). The theory enunciated in the former, by title and by content, deals not with taxation but with the police power, and is, by the author's own admission, inconsistent with numerous decisions of this Court. *See,* e.g., *U. S. v. Central Eureka Mining Co.,* 357 U.S. 155 (1958), where this Court held that a government order shutting down private gold mines so that workers would be available for service in copper mines to produce ore necessary for the Government's war effort was not a compensable taking. *See also,* the grade crossing cases, e.g., *Atchison R. Co. v. Pub. Util. Comm'n,* 346 U.S. 346 (1953).

As pointed out in Justice Pomeroy's dissent at footnote 3 (P. 41a), the *Hasegawa* case retains no semblance of validity after the decision of this Court in *Dean v. Gadsden Times Publishing Corp.,* 412 U.S. 543 (1973).

Justice Roberts is simply incorrect in his assertion that the competition aspect makes this a case of first impression. The fact is that on several occasions this Court has been faced with almost identical situations, where the taxing body was competing with the taxed industry.[8] This issue was first decided by this Court over a century ago in *Veazie Bank v. Fenno,* 75

[8] The attempt of the majority below to carve out an exception to the *Magnano* doctrine is not only inconsistent with the holdings of this Court, but also, it is submitted, evidences an unfortunate view of government as an entity apart from the people. The tax

U.S. (8 Wall.) 533 (1869). There a 10% tax was imposed by Congress on the notes of state banks. This was in addition to other taxes aggregating 6% on state banks, for a total of a 16% tax. 75 U.S. at 549, 554 (dissenting opinion). As noted in the dissenting opinion, 75 U.S. 549, 556, the purpose of the tax on state bank notes was to foster the national banks at the expense of the state banks.

Nonetheless, despite the competition aspect, the Court sustained the tax against a confiscation argument such as is made here, holding, 75 U.S. at 548:

> "It is insisted, however, that the tax in the case before us is excessive and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the Bank, and is, therefore, beyond the constitutional power of Congress.
>
> "The first answer to this is that the Judicial cannot prescribe to the Legislative Departments

---

in *Magnano* aided the butter industry at the expense of the margarine industry to the point of eliminating the latter. Yet neither the majority below nor Professor Sax would hold that confiscation occurred there because, rather than favoring the government operation over the private industry, the tax favored another private industry.

Yet it would seem to be exalting form over substance to distinguish the situation where the governmental body effects the will of the people through a tax favoring the butter industry from that where it accomplishes its goals by creating a governmental agency.

The majority below and Professor Sax rely on this artificial distinction because the full impact of their thesis is troublesome. Carried to its logical conclusion, the holding below would prevent any taxation whatsoever, for, by its very nature, taxation favors one segment of society over another.

of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

A second case directly in point is *Puget Sound Co. v. Seattle,* 291 U.S. 619 (1934). There a power and light company alleged a taking of property without due process because the City imposed a gross receipts tax upon it while both the company and the City were "engaged and actively *compete*[*d*] in the business of furnishing electric light and power to consumers for hire." 291 U.S. at 621. (Emphasis added). This Court held that the due process clause does not prevent such competition. It pointed out that what the private company was actually seeking, as are respondents here, is insulation from competition, and the due process clause does not provide such protection. It noted:

> "The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the danger of such an injury fails to point the way. Legislation may

protect from the consequences of competition, but the Constitution does not. Helena Water Works Co. v. Helena, supra; Vicksburg v. Henson, 231 U.S. 250. The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state, Memphis Gas Co. v. Shelby County, 109 U.S. 398, 400; St. Louis v. United Railways Co., 210 U.S. 266, 276, nor can it relieve property of congenital defects, Madera Water Works v. Madera, supra, 456. It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. Those were risks which appellant took when it entered the field. No articulate principle is suggested calling for the conclusion that the appellant is not subject to the same risks because the competing business is carried on by the state in the exercise of a power which has been constitutionally reserved to it from the beginning.

"Such was the decision in Madera Water Works v. Madera, supra, where this Court pointed out that, in the absence of any contract restriction the Fourteenth Amendment does not prevent a city from conducting a public water works in competition with private business or preclude taxation of the private business to help its rival to succeed." At pp. 625-26.

Another case in which a tax on private operators was upheld despite competition from the taxing body was *Rapid Transit Corp. v. New York,* 303 U.S. 573

(1938). There, a tax on the gross receipts of public utilities was sustained despite a challenge based, *inter alia,* upon allegations of unfairness in that the private transit operators could not compete with the city-owned transit lines.

In *Jayne v. City of Detroit,* 348 U.S. 802 (1954), this Court reached the same result in a case involving municipally-owned parking facilities. In that case, the private parking operators filed suit in the Wayne County Circuit Court alleging that Detroit's ordinances providing for construction of off-street parking garages violated, *inter alia,* the due process clause of the fourteenth amendment by creating "unlawful and unfair competition with appellants' parking businesses." (Statement as to Jurisdiction, pp. 5-6). This argument was rejected on its merits by the Supreme Court of Michigan which treated a prohibition action against the Circuit Court judges as a kind of demurrer (Statement as to Jurisdiction, Appendix "A", pp. 25-26). On appeal by the operators to this Court, Detroit relied on *Puget Sound, supra,* and other similar cases. This Court determined that the situation which the Pennsylvania Supreme Court held to deprive the instant respondents of due process of law did not even present a substantial federal question, and the appeal was dismissed for that reason.[9]

---

[9] The assertion to the contrary in the Brief for Respondents in Opposition to the Petition for Certiorari notwithstanding, *Jayne* was indeed decided on its merits by this Court. The dismissal for want of a substantial federal question is a decision on the merits, that the alleged federal question raised by the appellant has no merit.

Argument

In *Gate City Garage v. City of Jacksonville,* 66 So. 2d 653, 660 (Fla. 1953), the court stated:

> "There may be public hospitals, waterworks, electric light plants, and other enterprises acquired and operated primarily for the benefit of the public and there may also be private hospitals, waterworks, and electric light plants operated primarily for private profit and private gain. When the Legislature authorizes a particular undertaking, such as the parking system involved in this case, and it is found and determined that such system primarily serves a public and municipal purpose, it is not a valid objection that the municipality will be engaged in competition with private business. . . .
>
> "We find no provision of the State or Federal Constitutions which prohibits a municipal corporation to acquire, own and operate a system such as that involved in this case because it may be in competition with private individuals, firms and corporations."

See also, Bowman v. Kansas City, 361 Mo. 14, 233 S.W. 2d 26 (1950), also sustaining the right of the city to

---

For cases treating such dismissals as determinations on the merits, see *North Coast Transportation Co. v. United States,* 323 U.S. 668 (1944); *Minersville District v. Gobitis,* 310 U.S. 586, 592 (1940); and *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247 (1959) (Brennan, J.) ("Votes . . . to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . ."). *See also,* Note, *Supreme Court Per Curiam Practice: A Critique,* 69 HARV. L. REV. 707, 709 (1956); and Note, *The Insubstantial Federal Question,* 62 HARV. L. REV. 488 (1949).

establish parking garages that compete with private industry.

Respondents have contended in their Brief in Opposition to the Petition for Certiorari that some of the cases cited by petitioner are distinguishable because the rate of the tax in *Puget* was lower than here, and because some of the cases do not involve taxes but merely competition by the government with private industry.

In the first place, the stated rate of tax is totally irrelevant divorced from other criteria. As Justice Eagen points out in his dissent (P. 34a), a much lower rate of tax can greatly affect a firm or an industry with a narrow profit margin.

More important, however, is that respondents have misread this Court's opinion in *Puget*. As indicated there, the private operator would be in the same relative situation if there were no tax at all, and the public operation were run at a loss and subsidized with public funds.

The majority below admits that a high rate per se cannot invalidate a tax. *Puget* holds clearly that competition from a public body does not warrant relief to a private operator. The tax is proper; competition is proper. The majority below holds that two rights make a wrong.

D. Requiring Government Either To Forego Levying Taxes or To Forego Providing Services in the Myriad Areas Where Government and the Private Sector Compete Will Be Disastrous

The decision below is not only inconsistent with the holdings of this Court, but it is also profoundly inconsistent with the structure of government as we know it. The decision below, if allowed to stand, threatens to destroy the ability of government to serve the public.

The consequence of the holding below is to deny public bodies the right to provide badly-needed services in areas where the private sector is involved, unless government forfeits its right to tax the private sector.

Respondents in their Brief in Opposition (page 19) disagree that dire results are possible, because they suggest that this case is *sui generis,* and must be limited to its allegedly peculiar facts. Petitioner submits that analogous factual situations exist throughout society. *See infra.* The court below has radically altered the law relating to the supplying of services by government. To limit that altered law to this particular case might benefit government, but it would hardly promote respect for the law, for the decision would be, in the words of Justice Owen Roberts, like "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright,* 321 U.S. 649, 669 (1944).

Can it be that in an area where government-supported public transit exists and necessarily competes with private bus, street railway, taxi, and railroad companies, as well as with private parking garages and lots, a governmental body may no longer levy the rate of tax its legislature finds necessary for it to discharge its obligations?

Likewise, where the government provides low-cost housing, must it compensate all landlords whose competitive position has declined? Although privately-owned airports seldom have the resources sufficient to construct runways large enough for jet airplanes, does the building of a government-operated airport prevent taxation of private airports? Must government forego taxation of private ferry operators at the rate it deems necessary when it builds a bridge? Is a state constitutionally forbidden to tax a private school because it operates a public school system? The list can be multiplied endlessly. Under the decision below, government will be required either to forego levying taxes or to forego providing services in such areas as: utility services, including electricity, water, sewage, and garbage disposal; recreational services such as municipal stadiums, parks, swimming pools, golf courses, ski slopes and cultural programs; and educational services and facilities of all types.

Furthermore, the decision below has grave implications with regard to the efforts of governmental agencies to cope with the twin crises of air pollution and fuel shortage. A plan for additional taxes upon the privilege of parking has been one of many possible

solutions proposed to help to solve these problems,[10] all of which solutions will undoubtedly redound to the detriment of parking operators.

Surely a consequence of an additional tax on parking or on gasoline, or some other means of restricting the amount of traffic coming into the metropolitan area, will be the diversion of the commuting population from the private parking operators to the public transit systems. If the instant tax is invalid, these projected taxes may be as well, and we may be condemned to choke on our automobile exhausts until our fuel supply is itself exhausted.

It is respectfully submitted that competition between government and the private sector permeates our society. It has existed, particularly in education, almost since the founding of the country. To require government to forego taxation of private persons at the rate its legislative body deems wise merely because it is in competition with the taxpayer will cripple government.

---

[10] *See, e.g.*, U. S. News and World Report, Vol. 74, January 8, 1973, p. 58.

U. S. News and World Report, Vol. 74, January 29, 1973, p. 53.

Business Week, April 14, 1973, page. 27.

Business Week, August 4, 1973, page 21.

U. S. News and World Report, Vol. 72, March 13, 1973, p. 74.

II. ASSUMING ARGUENDO THAT A HIGH TAX RATE COMBINED WITH COMPETITION FROM THE TAXING BODY COULD IN A PROPER CASE BE CONSIDERED CONFISCATORY, PLAINTIFFS HAVE NOT PROVEN CONFISCATION HERE

Petitioner believes that it has demonstrated fully that the legal predicates of the majority opinion below are incorrect, but even if Justice Roberts' legal views were accepted, respondents cannot prevail because they failed to develop the evidence necessary to show a violation of the due process clause.

In the instant case, the facts are intertwined with the constitutional question. This Court noted in *New York Times Co. v. Sullivan,* 376 U.S. 254, 285 (1964), that its duty is not limited to the elaboration of constitutional principles, but in proper cases it must also review the evidence to see that those constitutional principles have been constitutionally applied. In *Fiske v. Kansas,* 274 U.S. 380, 385-86 (1927), this Court stated:

> "[T]his Court will review the finding of fact by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts."

Such is the situation here.

In the process of applying the constitutional issues to the facts of the instant case, the presumption of

constitutionality that applies to all enactments should be borne in mind. *Flemming v. Nestor,* 363 U.S. 603, 617 (1960). The Court there referred to Chief Justice Marshall's famous language in *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87, 128 (1810), where the Court stated:

> "... it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

See also, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 625 (1819) (Marshall, C. J.) (dictum).

In *Atkin v. Kansas,* 191 U.S. 207, 223 (1903), in sustaining a maximum hour law, this Court held that legislative enactments should be upheld unless they are "plainly and palpably, beyond all question" unconstitutional. This presumption in favor of constitutionality has been held especially applicable to a revenue measure, *Nicol v. Ames,* 173 U.S. 509 (1899), since the power to tax is so vital to government. *McCulloch v. Maryland, supra.*

With this standard in mind, respondents' proof fell far short of that necessary to sustain a holding of confiscation.

Respondents rest their case upon alleged proof of the unprofitability of their operations. It is submitted that they have not even proven unprofitability, but

even if they had, unprofitability by no means is synonymous with confiscation.

A. Lack of Proof Re Unprofitability

Respondents purport to have proven unprofitability for a six-month period and a projected unprofitability for six months more. Yet, as Justice Pomeroy noted in footnote 6 of his dissent (P. 43a), respondents' evidence on unprofitability is most suspect. He pointed out, *inter alia*, that respondents' "expert witness", John S. Buzzard, who prepared Exhibit 1 (A. 496a-596a; 60a), the crux of respondents' case, is an electrical engineer (A. 42a). Mr. Buzzard has no degree in accounting or economics (A. 49a), nor had he ever audited anyone's books for compensation (A. 51a).

Further, Justice Pomeroy pointed out that the data introduced did not purport to be a complete presentation of respondents' operations. The chancellor had found that some of respondents' garages were not included in Exhibit 1 and thus that the projection was distorted (Finding No. 17, P. 89a). Exhibit 1 did not include respondents' experience where they managed parking facilities on behalf of others for a fee (A. 98a-100a). Only that portion of the respondents' business directly related to parking was included in Exhibit 1 (A. 101a). The Buzzard Study did not include figures showing respondents' net profit or net loss (Finding No. 18, P. 89a). The conclusions were based

solely on operating income and operating loss (A. 65a-71a; 101a; 152a-153a). This is significant since the record does reveal that at least one of the respondents, Stanwix Auto Park, has added to its parking facility an office building and apartment, the income for which is not shown. Stanwix Auto Park owns 50% of the stock of the corporation which owns the office building and apartment (A. 170a). The advantage to the office-apartment complex of having attached parking may well be reflected in a statement of net profits.

Justice Pomeroy also noted that there was no showing of what portion of the operating expenses were salaries to the owners and what portion of the salaries really represented return on investment (P. 43a, footnote 6). This apportionment would be significant, as seven of the twelve respondents are owned or controlled by one man, John T. Stabile (A. 201a).

Significantly, Exhibit 1 represents only the experience of downtown lots, with few exceptions, and not the entire parking industry of the City of Pittsburgh (P. 53a). The spaces represented are those in the central business district of the City and exclude the majority of parking lot operators and their experience in other sections of the City including North Side, Oakland and East Liberty, where there are numerous parking facilities.

Certain other exhibits were also misleading, such as Exhibit 7 (A. 600a; 89a) showing only 20 public lots out of 80 and only 8 public garages out of 15. Likewise, Exhibit 6 considers only 3 garages (A. 599a; 85-88a).

Most important, however, respondents' case on unprofitability rests not on actual experience, but on a projection. As Justice Pomeroy stated (P. 43a), such projections are inherently inadequate when actual economic data exist for the period involved. In *Knoxville v. Water Co.*, 212 U.S. 1, 17 (1909), this Court reversed the decree of a lower court enjoining the enforcement of maximum water rates in a public utility situation. This Court held that where the case rested "not upon observation of the actual operations under the ordinance, but upon speculations as to its effect, based upon operations of prior fiscal years," it would not find confiscation if there was any doubt at all. The bill was dismissed without prejudice to its reinstitution if the actual operation of the ordinance should prove confiscatory.

B. Lack of Proof Re Confiscation

Assuming *arguendo* that respondents proved unprofitability, under no circumstances can mere unprofitability be considered a confiscation of respondents' property.

The majority below admits that, to prove confiscation, a party must ordinarily show both that the *industry* is being forced out of business and that the tax cannot be passed on to the customer. The first test was met here, says the majority, and the second, if not met directly, was satisfied inferentially because with the competition from the allegedly lower-priced "taxing body", an increase in rates by respondents would

simply have increased the disparity between their rates and those of the "taxing body".

Justice Pomeroy pointed out in dissent (P. 41a-42a) that a review of the record shows clearly that neither of these conclusions is supported by the evidence.

---

1. *No showing that the industry is being forced out of business.*

Consider first the majority's conclusion that the tax was forcing respondents out of business. The most obvious refutation of this is the fact that none of the respondents was out of business at the time of trial (P. 98a)and all are still in business (P. 43a). The fact that many in this industry allegedly cannot make a profit for a short period of time proves nothing. Many industries are in a like situation, and a 5% increase in a gross receipts tax surely cannot be the culprit for all of them.

Moreover, even if respondents had gone out of business, the parking tax could not have been the cause. Respondents' receipts, after the tax, either increased or remained stable when the tax rate was increased.[11] Respondents' labor costs and other operating expenses have increased also (A. 175a; 321a).

---

[11] After a 5% increase in the parking tax effective in 1969, respondents' revenue after deduction of parking taxes *increased* in the amount of $325,000 (A. 414a). After the 5% increase in parking tax effective February 1, 1970, respondents' revenues for the first six months of 1970, compared to the first six months of 1969, declined only $11,000 out of a total of $2,764,000, or 3/10 of 1% (A. 415a).

Furthermore, no taxing body can be held responsible for poor business practices on the part of private industry. Many of the respondents have locked themselves into long/term leases with no provision therein for readjustment if taxes escalate (A. 146a; 209a; 237-238a; 271a). In *New York Rapid Transit Corp. v. New York City,* 303 U.S. 573 (1938), this Court was not impressed by the argument that the private transit operators could not raise their prices because of a contract with the City. It was pointed out that a tax need not be meticulously tailored to each particular contract that the taxpayer might have entered into. Likewise, in *John McShain, Inc. v. District of Columbia,* 205 F. 2d 882, 883 (D.C. Cir. 1953), the Court held that a use tax on construction materials as applied to purchases made subsequent to the passage of the act under contracts made prior thereto, did not violate the due process clause of the fifth amendment:

> "The imposition of a new tax, *or an increase in the rate of an old one,* is one of the usual hazards of business enterprise: . . ." (emphasis added).

---

2. *No Showing That the Tax Cannot Be Passed On.*

Secondly, the majority below erred grievously in determining that the competition of the taxing body prevents the tax from being passed on to the consumer. In the first place, Ordinance No. 704 of 1969 by its terms imposes the tax on the Parking Authority, and at the time of trial, the Parking Authority was paying the tax.[12]

---

[12] As set forth in footnote 9 (P. 21a) of the majority opinion, the Court of Common Pleas of Allegheny County ruled that the

Argument

It is true that the Authority is exempt from real estate taxes and can borrow money at lower rates than respondents can.[13] This advantage is common to every governmental operation and consistent with the equal protection clause of the fourteenth amendment, *Puget Sound Co. v. Seattle, supra.* The extent of this advantage translated into parking rates nowhere appears in the record. In fact, the record shows that, while some

---

Parking Authority is exempt from this tax. *Public Parking Authority of Pittsburgh v. City of Pittsburgh,* No. 687 July Term, 1972. That decision was affirmed by the Commonwealth Court of Pennsylvania at No. 97 C.D. 1973 on January 14, 1974. Upon application by the City at No. 3579 Miscellaneous Docket 1974, the Supreme Court of Pennsylvania, by order dated January 23, 1974, granted an extension of time within which to file a petition for allowance of appeal to that Court. Said petition for allowance will be filed prior to March 20, 1974.

It should be noted that the Authority has always acknowledged its liability for the tax, was joined as a party-plaintiff without its permission, and filed a petition to strike it as a named plaintiff. The real plaintiffs in the case are some of the same parties as the respondents in this case.

Thus, respondents' lament that they are unable to raise their rates because of competition from the Parking Authority which need not pay the parking tax, even if true, fits the classic definition of *chutzpah*: the man who, having murdered his parents, begs mercy from the court because he is an orphan. Any harm resulting to respondents from the Parking Authority's not paying this tax is self-inflicted.

[13] It is also true, however, that the real advantage of the Authority garages is that they are more convenient, resulting in higher patronage, and more efficient, being self-service, whereas most of respondents' operations are attendant-operated, with resulting higher labor costs. The study made for the Parking Authority, respondents' Exhibit 11 (A. 614a-686a; 273a), states:

> "Self-parking characterizes the Authority garages, while the other public facilities continue to be almost entirely attendant-operated." (A. 635a).

of the Authority rates are lower than respondents', some are higher (A. 330a-331a). The majority is simply incorrect in its assertion that Authority rates are lower.

In at least five places in the majority opinion, Justice Roberts refers to the "lower rates" of the Parking Authority. In particular, the opinion notes (P. 14a):

> "For example, the record establishes that the average all day rate for the Public Parking Authority is about $2.00, while the average all day rate for private operators is approximately $3.00."

Justice Roberts used this alleged disparity in rates to attempt to show the inability of the operators to pass the tax on to the patrons (P. 17a-18a):

> "Clearly, if the private parking lot operators attempted to pass the full burden of the tax on to the consumers they would only succeed in increasing the disparity in the already disparate rates. For example, at the all day rate, shown in the record, if appellants were to attempt to pass the tax on to their patrons, their rates would increase from an average of $3.00 to $3.60, while a similar tax pass-on by the Public Parking Authority would increase their average rate from $2.00 to $2.40. Thus the differential in rates would increase from $1.00 to $1.20."

The fact is, however, that the assertion that the all-day rate is $2.00 for the Authority and $3.00 for the private operators is nowhere supported by the record, and is

simply incorrect. The record reveals that the Authority's all-day rate is higher than the private operators! Respondents' own expert testified that the Authority's average nine-hour rates were $2.56, compared with $2.37 for private operators (A. 330a). Since most parkers in the downtown area park for long periods of time, the average being close to six hours (A. 649a), the Parking Authority garages are more expensive for the bulk of consumers.

While respondents, in their Brief in Opposition, at pages 24-25, refer to certain exhibits which pick and choose among a few garages and are thus not representative (nor are they current, being for the year 1969), the 1970 average, testified to by respondents' own witness, showed that the Supreme Court of Pennsylvania completely misread the record.

Yet, even if Authority rates had been consistently lower than respondents', the basic fallacy in the reasoning below is that the Authority rates would not prevent respondents from passing the incidence of the tax on to consumers. As pointed out in Part III of Justice Pomeroy's dissent (P. 46a), the majority ignores elementary economics. It is undisputed that there is an unsatisfied demand for 4100 parking spaces in downtown Pittsburgh (P. 47a; 87a; A. 616a).[14] Respondents' Exhibit 11, Table 4, shows that facilities open to the public in the central business district, ex-

[14] The many opinions in this case have referred to a 4100 space deficiency. This is an "adjusted" space deficiency, taking into account operating efficiency, which is about 85-90%. To provide 4100 adjusted spaces, 4700 actual spaces are required (659a).

clusive of Authority garages, are 99.2% occupied at 2:00 p.m. on a typical weekday, and all facilities open to the public, including Authority garages, are at that time 102.9% occupied (A. 640a; 273a). Justice Pomeroy succinctly states (P. 47a-48a):

> ". . . an entrepreneur (the appellants) who controls 71% of the supply in a market of unsatisfied demand need not concern himself with a low-cost competitor (the Parking Authority) who controls 29% of the supply, has no excess capacity, and cannot service demand which the 71% competitor might drive away through price increases.
>
> * * * * * *
>
> "The presence of the Parking Authority in this picture, and its preferred status in terms of property taxes, is therefore in my view an irrelevant factor."

Respondents' argument that it cannot raise its prices despite a shortage of spaces is akin to gasoline dealer *A* saying, when faced with an increase in his wholesale cost, that he cannot raise his retail price because gasoline dealer *B* has a lower wholesale cost and thus can undersell him. Anyone who has attempted to purchase gasoline recently knows that *A* need not worry about his competion, since *B* cannot service any more demand. Likewise the Parking Authority, in a shortage situation, cannot service any more demand.

Every other business reacts to an increase in costs and taxes by raising the price of its product or increasing the charge for its services. Surely respond-

ents can do likewise, particularly when the demand for their services in the central business district far exceeds the supply.

Justice Pomeroy correctly points out that respondents' evidence that the tax cannot be passed on is woefully inadequate and is contrary to prior experience (P. 44a-46a). Testimony from one respondent that one cannot increase prices because of a tax increase, since "Why wouldn't you get that rate before?" (A. 30a), shows an ignorance of basic economics. The answer obviously is that competition would drive the rate lower. But where the added factor of a tax is present, the competition cannot reduce the price either.

The evidence as to Meyers Brothers is, as Justice Pomeroy states, of only marginal relevance (P. 45a). As he says, we are dealing with an entire industry raising rates, not simply one member raising its rates. Footnote 8 of Justice Pomeroy's opinion states that the Chatham Center Garage rates were lower in both 1970 and 1973 than in other downtown garages, thus indicating a less strategic competitive position. This is borne out dramatically by Table 11 of respondents' Exhibit 11 (A. 667a; 273a). While the chart shows an overall 4100 adjusted space deficiency in the central business district, there is a 3500 space *surplus* in Sector VI, where Meyers Brothers' facility is located (A. 237a; 666a). Meyers Brothers' operation is thus hardly representative of even the central business district parking industry as a whole.

Finally, in their Brief in Opposition, respondents point to the testimony of Donald McNeil that further

rate increases would discourage shoppers from coming into Pittsburgh (A. 292a). It would seem that this merely states a truism, for, unless demand is totally inelastic (merely a theoretical possibility), an increase in price will result in some decreased consumption. The relevant question is "How much?", and Mr. McNeil provides no answers. The experience of the industry, see *infra*, would indicate very little loss of consumption.

If anything more than this truism can be attributed to Mr. McNeil's testimony, it would be well to consider his credibility. He stated unequivocally that a parking tax of 10% would destroy the parking industry (A. 327a), despite the fact that the industry had existed quite well since 1962 when the 10% tax was enacted, and, in fact, according to respondents' Exhibit 1, earned on the average 8.2% in 1968 and would have earned in excess of 8% for each of 1969 and 1970 at a 10% rate (A. 503a). This Court's comment in *Knoxville v. Water Co.*, 212 U.S. 1, 18 (1909), is relevant here:

> "This ordinance has not actually been put into operation; the inferences were based upon the operations of the preceding year; and the conclusions of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. . . ."

The actual experience of the industry supports the view that the tax can indeed be passed on to the consumer. General rate increases in the past have always resulted in an increase in gross receipts (P. 45a; A.

187a). The City experienced only a temporary reduction in the number of cars parked at its facility on the Wharf after it doubled its price for parking (A. 417a). Moreover, as can be seen from the Appendix to Justice Pomeroy's opinion (P. 49a), current rates are significantly higher than those which respondents sought to characterize as profit-maximized. Reality corresponds with theory: the Parking Authority cannot and has not prevented respondents from passing tax increases on to consumers.

Therefore, even if the argument that a high rate plus public competition constitutes a denial of due process were legally acceptable, that situation does not exist here.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court reverse the decree of the Supreme Court of Pennsylvania.

Respectfully submitted,
RALPH LYNCH, JR.,
City Solicitor,
GRACE S. HARRIS,
Special Asst. City Solicitor